

NORTHWEST ENVIRONMENTAL ADVOCATES



July 10, 2015

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER

U.S. Environmental Protection Agency
National Freedom of Information Office
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Filed via FOIA Online

**Re: Water Quality Standards for Aluminum, Ammonia, Cadmium, and Copper
for the State of Oregon**

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a regional non-profit environmental organization founded in 1969 and dedicated to preserving and protecting natural resources in the Northwest and the nation. NWEA works through advocacy, litigation, and education to protect and restore water and air quality, wetlands and wildlife habitat. NWEA has a long history of interest and involvement in environmental issues in the Northwest and the nation, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This request concerns EPA's actions and inactions pertaining to water quality standards for the State of Oregon. Specifically, this request pertains to EPA's disapproval of Oregon's criteria for aluminum, ammonia, cadmium, and copper and its obligation to promulgate replacement criteria.

I. FOIA Request

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

www.NorthwestEnvironmentalAdvocates.org

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We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or used by, in the possession of, or routed through the U.S. Environmental Protection Agency (EPA) related to:

1. Negotiation of the reasonable and prudent alternatives for aluminum, ammonia, cadmium, and copper criteria with the National Marine Fisheries Service in the biological opinion entitled *Jeopardy and Adverse Modification of Critical Habitat Biological Opinion for the Environmental Protection Agency's Proposed Approval of Certain Oregon Administrative Rules Related to Revised Water Quality Criteria for Toxic Pollutants*, issued on August 14, 2012, pertaining specifically to the 24-month time frame in which EPA was to "ensure that the new . . . criteria will be effective";
2. Work plans, schedules, plans for making plans, or any other form of planning for EPA development and promulgation of replacement criteria for the Oregon criteria for aluminum, ammonia, cadmium, and copper that EPA disapproved on January 31, 2013; and
3. Any post-biological opinion communications, *if any*, concerning the timing of EPA action on replacement criteria consistent with the reasonable and prudent alternatives, discussed in item no. 1 above, with any outside agency.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1), (l)(2)(i)-(ii).

As is discussed below, NWEA is involved in litigation regarding water quality standards. Use of information sought through FOIA is a recognized public use and benefit under FOIA's fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when "[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial." *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975)

(evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that “[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny.” *Idaho Wildlife Fed’n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), Slip Op. at 7. In that case, the court rejected the Forest Service’s denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was “sought for use in litigation against the federal government.” *Id.* at 3. The court ruled that such a proposition is “untenable” because:

The concept of the “private attorney general” is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy en-courages such litigation by awarding the plaintiff attorney’s fees and costs.

Id. at 8 (citation omitted). The court noted that the Idaho Wildlife Federation “is a non-profit organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws” and that “such activity would appear to be of the type generally considered to be public interest.” *Id.* Because policy-based disputes with agencies, as well as administrative challenges, “cannot be done completely without the ability to seek judicial review,” the court enjoined the Forest Service’s broad-brush rejection of fee waiver requests simply because they might interfere with an agency’s unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity.

We will also note at the outset that NWEA is not the only party interested in EPA’s plans and actions with regard to replacement criteria for these key pollutants. Ammonia and copper, in particular, are of significant concern to NPDES dischargers, which will have to meet any future revised criteria for these pollutants. Knowing when such criteria will be in place is a significant concern for pollution sources and anti-pollution advocates alike.

A. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns documents in the possession of EPA regarding ESA consultation on state submissions of water quality standards and promulgation of replacement criteria under the Clean Water Act following an EPA disapproval. State standards are generally not applicable for Clean Water Act purposes until EPA has approved such standards and they are not applicable where EPA has disapproved them. EPA’s actions or decisions to not take action on state submissions or following its disapproval actions concerns the operations of the government because of the mandatory duties established by the CWA for EPA action. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA to act or not act to replace criteria that it had previously disapproved under the CWA and its agreement to do so to address a jeopardy conclusion by the National Marine Fisheries Service.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

Unlike a state triennial review of water quality standards, when a state generally puts out some information about its plans, EPA does not generally state what its plans are with regard to acting when it is required to act, as after its disapproval of state submissions. In addition, documents and information pertaining to actions such as consultation under the ESA is generally not made available to the public. Without access to EPA records there is no mechanism by which the public can gain insight into what, if anything, EPA is doing to meet its mandatory duties and obligations under the CWA or the ESA. Accordingly, the disclosure of records that will indicate what actions EPA has already taken and what actions EPA plans to take and what actions EPA may or may not have planned to take in the past are essential to the public understanding of what can be expected to remedy an EPA disapproval of insufficiently protective water quality standards that have now reverted, owing to EPA’s disapproval action, to even less protective standards. This is of concern to members of the public and advocacy organizations that want protection of threatened and endangered species and who are involved in regulatory actions that pertain to the standards for the pollutants at issue in this request. It is equally of concern to regulated sources of pollution, such as NPDES permittees, who are in the dark about which standards will apply in the future and when. In addition, without access to records, should they exist, to demonstrate what action, if any, EPA has initiated under the CWA to promulgate replacement criteria, as required by the CWA and ESA, the public has no way of knowing whether EPA has complied with the requirements of those laws or when it intends to comply. Similarly, without access to these records, NWEA cannot evaluate whether EPA has any intention of meeting its legal requirements and providing protection for threatened and endangered species. Without these records, NWEA cannot evaluate to what extent EPA may or may not be slowly working towards compliance with the law.

Release of the requested records will allow the public, including NPDES permittees, to understand what action EPA has taken or planned to take or plans on taking regarding standards to meet both the CWA and the ESA. To the best of our knowledge, EPA has not posted any information about its actions or plans on its websites. Therefore, there is no other way to obtain this information on EPA actions and plans other than through use of the FOIA. For this reason, reviewing records of EPA’s action or inaction will be “meaningfully informative” and is therefore likely to contribute to an understanding of when protective water quality standards are expected to be in place in Oregon and the policy and regulatory ramifications associated with those facts, such as effects on NPDES permitting. Having such information is also “meaningfully informative” in that it ensures NWEA and other organizations do not engage in frivolous or unfounded litigation. Having such information is meaningfully informative to NPDES permittees and members of the public commenting on permitting actions, including for discharges in state waters upstream of Oregon waters, because it provides them with information concerning the future status of water quality standards that will have regulatory implications.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track

record of working with people as far away from Oregon as the State of Florida,, to assist them by conveying our understanding of EPA policies and provide EPA documents. NWEA is known for being generous with its time and information, despite its extremely limited resources. NWEA is known for helping permittees and other pollution sources to better understand Oregon water quality standards and their evolving nature. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife, as well as NPDES permittees which are concerned about not knowing which criteria will be used in renewed NPDES permits and when. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, and the press, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means, as appropriate: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, in litigation, on its website, through internet file sharing programs, and through formal public comments and other formal documents prepared for agencies. NWEA will specifically communicate with people from Washington and Idaho, which share waters with Oregon and have the same and similar threatened and endangered species.

NWEA's investigation and evaluation of the records will be made available to other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, possible federal standards promulgation, TMDL development, and permit issuances, all of which occur regularly and depend upon water quality standards, some of which have now reverted to very old criteria and which, presumably will, in the future, be replaced by yet more stringent criteria. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's decision-making and its actions. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making and actions under the Clean Water Act and ESA.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations and others involved in regulatory activities through emails, phone calls, meetings, list serves, file sharing programs, and through its website.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's

activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver). There is no way, short of a FOIA request, to ensure that accurate information is obtained from EPA.

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of EPA in light of its actions and inactions pursuant to the CWA and ESA. It will also contribute to the ability of NWEA and others to oversee the activities of the EPA, with regard to related CWA regulatory actions that are intended to ensure that such standards are met in Oregon waters, actions such as the issuance of NPDES permits. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in EPA regulatory actions, in permitting actions and the issuance of TMDLs, and in litigation. NWEA also participates in matters of EPA national policy, in areas such as standards and TMDLs. It also shares documents and information with

other organizations that engage in those activities. NWEA will also disseminate the information to organizations through listserves, websites, meetings, memoranda, and direct sharing of the records as appropriate. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations to do the same.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request just as it did with its previous identical request.

We look forward to your response. Please feel free to contact me at 503/295-0490 if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell
Executive Director